

1-1-2004

## Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003)

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Owen Walker, Court Report, Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003), 7 U. Denv. Water L. Rev. 439 (2004).

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the Corps' motion for summary judgment. The Foundation appealed the decision to the United States Court of Appeals for the Third Circuit, which upheld the district court's decision, but for different reasons.

On appeal, the Third Circuit first noted that WRDA requires the Corps to include environmental protection as one of its primary purposes in operating and maintaining its water resource projects. The Foundation argued that the Corps violated this statute because the Corps emphasized flood control and not fishery management as the primary purpose of the Walter Dam Reservoir. However, the court found Congress did not give the Corps specific instructions to carry out this objective; therefore, the Corps retained a great deal of discretion to determine where, when, and how much of WRDA's environmental protection mission to implement at a given water resources project. After determining that the Corps' actions were indeed subject to judicial review, the court held that the Corps satisfactorily demonstrated that it made environmental protection a primary mission, and its actions were not arbitrary and capricious. The court then held that the Corps included environmental protection in its overall operation of its water resource projects, and more specifically, at the Walter Dam.

In sum, the Third Circuit held the district court erred in finding that the Corps' actions were not subject to judicial review. However, Congress gave the Corps a vast amount of discretion to implement environmental protection as one of the primary Corps' missions in regards to water resources projects. Therefore, that the Corps emphasized flood control and not fishery management as the primary objective of the Walter Dam Reservoir did not mean that it violated the WRDA. Thus, the court held the Corps' decision was subject to judicial review; however, it affirmed the district court's decision due to the discretion afforded the Corps.

*Brett Johnson*

#### FOURTH CIRCUIT

**Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003)** (holding that, for purposes of the Clean Water Act, the United States Army Corps of Engineers had jurisdiction over wetlands adjacent to nonnavigable tributaries of navigable waters, and that a man-made ditch was a "tributary").

The United States Army Corps of Engineers ("Corps") brought an action against Newdunn Associates, Orion Associates, and Northwest Contractors (collectively "Newdunn") to enjoin them from draining certain lands in alleged violation of the wetlands provision of the Clean Water Act ("CWA"). The Virginia State Water Control Board

("Board") brought a separate action in state court, the Circuit Court for the City of Newport News, Virginia, which Newdunn removed to the Federal District Court for the Eastern District of Virginia ("district court"). The district court consolidated the two actions and denied the Board's motion to remand its case back to the trial court. Finding that the Corps and the Board both lacked jurisdiction over the Newdunn property under the CWA, the district court ruled against each in favor of Newdunn. On appeal, the Fourth Circuit Court of Appeals reversed, finding that the district court did not have jurisdiction over the Board's action, and that the Corps did, in fact, have the asserted jurisdiction over the Newdunn property.

Newdunn owned a parcel of land in Virginia, the majority of which was undisputedly "wetlands," as defined under the CWA. The Newdunn wetlands drained into a man-made ditch that, in turn, drained into Stony Run, a navigable water-in-fact of the United States, also as defined under the CWA. Although formerly linked by a natural waterway, the wetlands and Stony Run, after construction of an interstate highway, were now connected by the man-made ditch. The Corps and the Board each attempted to assert jurisdiction over the Newdunn property in order to prevent Newdunn from discharging silt-laden waters into navigable waters without a permit. When Newdunn rejected the Corps' jurisdiction and ignored an order issued by the Board, both agencies brought actions asserting jurisdiction.

The Board brought its action in the state circuit court but Newdunn removed it to the federal district court. The district court took jurisdiction over the action based on federal question jurisdiction. Finding the state action turned on the definition of wetlands, which was common to both the state and federal statutes, the district court reasoned it had subject matter jurisdiction, since the federal definition controlled. The court reversed, finding the two statutes' common definition served to scientifically define a wetland, rather than to confer jurisdiction. Since the parties agreed the property contained scientific wetlands, as defined under the CWA, there was no disputed federal question, and no federal jurisdiction. The court therefore remanded the Board's action to state court.

Turning to the Corps' assertion of jurisdiction over the Newdunn property, the court noted first that the Corps had statutory authority to require and issue permits for the discharge of dredge and fill material into navigable waters under Section 404 of the CWA. Under the Supreme Court case *United States v. Riverside Bayview Homes, Inc.*, the Corps also had authority to exercise jurisdiction over wetlands adjacent to other waters. The Supreme Court came to this conclusion in deference to the Corps' own determination that wetlands adjacent to other waters should be subject to its CWA permitting authority, since wetlands might function as integral parts of neighboring aquatic systems. The Court held the Corps had jurisdiction over navigable waters, tributaries to navigable waters, and wetlands adjacent to either. While jurisdiction over waters having no connection to navigable or interstate waters would overreach the authority Congress could

delegate to the Corps under the Commerce Clause, the Court held the Corps did have jurisdiction over waters with a sufficient hydrological connection to navigable waters.

Thus, the Corps' jurisdiction could therefore reach any branch of a tributary system that eventually flowed into a navigable body of water or a water of the United States, and any wetland adjacent thereto. Since the Newdunn wetlands were adjacent to the nonnavigable ditch that drained into the navigable waters of Stony Run, the last question was whether the ditch constituted a tributary of Stony Run. Noting that rerouting the ditch did not meaningfully alter the wetlands' longstanding connection to Stony Run, and that the Corps' definition of "tributary" included roadside ditches, the court rejected Newdunn's asserted distinction between natural and man-made watercourses for purposes of defining "tributary."

Therefore, the Newdunn wetland was adjacent to a tributary of a navigable water, and was subject to the Corps' jurisdiction for the purpose of CWA permitting requirements.

*Owen Walker*

## FIFTH CIRCUIT

**In re Needham, 354 F.3d 340 (5th Cir. 2003)** (holding that Oil Pollution Act did not permit federal government to impose regulations over tributaries that were neither themselves navigable nor truly adjacent to navigable waters; bayou containing residue from oil spill flowed directly into company canal that was navigable-in-fact and was plainly adjacent to navigable waters, thus triggering federal regulatory jurisdiction pursuant to Oil Protection Act).

The United States Environmental Protection Agency ("EPA") and Coast Guard (collectively "United States") filed suit against James and Janell Needham ("Needhams") for reimbursement of cleanup costs associated with an oil spill. The United States Bankruptcy Court ("bankruptcy court") for the Western District of Louisiana found that the Needhams were not liable to the United States for the cleanup costs because the waters in question were not navigable, and were therefore beyond the reach of the Oil and Pollution Act ("OPA"). After the United States District Court for the Western District of Louisiana affirmed, the United States appealed the decision to the United States Court of Appeals for the Fifth Circuit which reversed and remanded the lower court decisions.

On January 25, 1995, an employee of Needham Resources, Inc. ("NRI"), owned by the Needhams, pumped oil into a drainage ditch. Initially, NRI hired a private contractor to clean the spill, but lacked the financial resources to complete the effort. The United States finished the cleanup effort, expending \$207,000. On February 8,